IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 1141

BARBARA HUTTER, Executrix of the Estate of [illegible],

Petitioner,

vs.

RICHARD C. LINDSTROM, Acting Attorney General, and JOHN P. FOLEY,

Respondents.

Petition for Writ of Certiorari to the Superior Court of the State of California in and for the County of San Francisco.

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SUBJECT INDEX

PAGE

Proceedings below 1

Jurisdiction 2

Questions presented for review 4

First question 4

Second question 4

Statutory provision involved 5

Statement of the case 5

Argument 8

Reasons for granting the petition 8

Appendix:

Excerpts from the applicable collective bargaining agreement ..... App. p. 1

TABLE OF AUTHORITIES CITED

CASES	PAGE
A. L. Kornman Co. v. Amalgamated Clothing Workers, 264 F.2d 733	16
Association v. Westinghouse Elec. Corp., 348 U. S. 437, 99 L. Ed. 510, 75 S. Ct. 488	4, 14
Doucette v. Vincent, 194 F.2d 834	3
Garrett v. Moore-McCormack Co., 317 U. S. 239, 87 L. Ed. 239, 63 S. Ct. 246	3
I. B. of T., C., W. & H. Local 24 v. Oliver, 358 U. S. 283, 3 L. Ed. 2d 312, 79 S. Ct. 297	13
Internat'l Ass'n of Mach. Local Lodge 2040 v. Servel, Inc., 268 F.2d 692	15
Item Company v. New Orleans Newspaper Guild, 256 F.2d 855	16
Mississippi Valley Electric Co. v. Local 130, etc., 278 F.2d 764	15
Silverton v. Valley Transit Cement Company, 249 F.2d 409	15
Textile Workers Union v. Lincoln Mills, 353 U. S. 448, 1 L. Ed. 972, 77 S. Ct. 912	2, 8, 9, 12, 13, 17
Textile Workers Union of America v. Cone Mills Corp., 268 F.2d 920	15
United Steelworkers v. America Mfg. Co., 363 U. S. 564, 4 L. Ed. 2d 1403, 80 S. Ct. 1343	9, 10, 17
United Steelworkers v. Enterprise Wheel and Car Corp., 363 U. S. 593, 4 L. Ed. 2d 1424, 80 S. Ct. 1358	11, 17
United Steelworkers v. Pullman-Standard Car Mfg. Co., 241 F.2d 547	14, 17
United Steelworkers v. Warrior & Gulf Navigation Co., 363 U. S. 574, 4 L. Ed. 2d 1409, 80 S. Ct. 1347	10, 17
United Steelworkers of America v. New Park Mining Co., 273 F.2d 352	15, 17

STATUTES PAGE

Labor-Management Relations Act of 1947, Sec. 301 ..... 2, 4, 8, 14

Labor-Management Relations Act of 1947, Sec. 301(a) 5

61 Statutes at Large, p. 156 ..... 2, 4, 5, 8, 14

United States Code, Title 29, Sec. 185 2

United States Code, Title 29, Sec. 185(a) 5

United States Code Annotated, Title 28, Sec. 1257(3) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

BURGERMEISTER BREWING CORPORATION,

Petitioner,

vs.

RICHARD C. LINDSTROM, ARCHIE ALDINI, and JOHN P. FOLEY,

Respondents.

Petition for Writ of Certiorari to the Superior Court of the State of California in and for the County of San Francisco.

Petitioner Burgermeister Brewing Corporation, a corporation, prays that a writ of certiorari issue to review the judgment of the Superior Court of the State of California in and for the County of San Francisco rendered against Petitioner and in favor of Respondents.

Proceedings Below.

The proceedings were instituted by Respondents who filed claims against Petitioner in the Small Claims Division of the Municipal Court of the City of San Francisco. Judgment was for Respondents. No formal opinion was rendered by the Small Claims Court but the basis of the decision is stated in a letter signed

by the judge of that Court [Clk. Tr. p. 5 *et seq.*]. Appeal was taken under California law to the Superior Court of the State of California in and for the County of San Francisco which heard the matter *de novo*. Judgment was again rendered for Respondents [Clk. Tr. pp. 75-77]. A timely motion for a new trial was filed [Clk. Tr. p. 78], which motion was denied [Clk. Tr. p. 94].

No further appeal is provided under California law. The decision of the California Superior Court is therefore the final decision of the courts of the State of California.

Jurisdiction.

The jurisdiction of this Court is invoked under the Labor Management Relations Act of 1947, Section 301 (61 Stat. 156, 29 U. S. C. §185) by Petitioner, which is engaged in a business affecting commerce as defined in the Act.

In this action, which is within the scope of Section 301, the state courts applied law which was contrary to and in conflict with federal labor policy. Federal substantive law is to be applied under Section 301. A judgment of a state court failing to apply controlling federal law or applying inconsistent or conflicting law, may be reviewed by writ of certiorari.

28 U. S. C. A. Section 1257(3).

> "A case or controversy arising under §301(a) is, therefore, one within the purview of judicial power as defined in Article 3."
>
> *Textile Workers Union v. Lincoln Mills* (1957), 353 U. S. 448, 457, 1 L. Ed. 2d 972, 77 S. Ct. 912.

Where a state court is bound to apply controlling federal law and a question is raised as to whether it has done so, a federal question is created which is reviewable by this Court.

> "So here, in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected. Whether it did so raises a federal question reviewable here under §237(b) of the Judicial Code, 28 U. S. C. A. §344 (b)."
>
> *Garrett v. Moore-McCormack Co.* (1942), 317 U. S. 239, 245-246, 87 L. Ed. 239, 244, 63 S. Ct. 246.

This is true even if the action in the state court is based upon an asserted non-federal claim but a defense is set up under federal law.

> "But if, in the course of a suit begun in a state court on an asserted non-federal claim, a defense is set up under the federal Constitution or laws, and if the state court decides such question of federal law, then the judgment of the state court may be reviewed by certiorari under 28 U. S. C. §1257(3). . . ."
>
> *Doucette v. Vincent* (1st Cir. 1952), 194 F. 2d 834, 845.

Questions Presented for Review.

First Question.

Whether in an action brought by an individual employee in a state court to enforce the provisions of a collective bargaining agreement covering employees in an industry affecting commerce, the state court, in view of the federal labor policy declared by this Court under Section 301, must apply federal substantive law which provides that where the validity of the claim is dependent upon a disputed interpretation of the agreement and the agreement provides for arbitration of such dispute, the dispute must be settled within the scope of the grievance and arbitration provisions of the agreement.

Second Question.

Whether an individual employee may enforce the terms of a collective bargaining agreement in a state court with respect to a "uniquely personal claim" under *Association v. Westinghouse Elec. Corp.* (1955), 348 U. S. 437, 99 L. Ed. 510, 75 S. Ct. 488, where the validity of the claim depends upon, and the court would have to decide the disputed interpretation of a collective bargaining agreement, and such agreement specifically provides the machinery for arbitration of such dispute.

Statutory Provision Involved.

Section 301(a) of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. §185(a), provides as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Statement of the Case.

Petitioner is party to a collective bargaining agreement with the Teamster Brewery and Soft Drink Workers Joint Board of California, affiliated with the International Brotherhood of Teamsters, Warehousemen and Helpers of America (referred to herein as the "Union"). The agreement appears in the Clerk's Transcript page 67 ff. The Union represents the production employees of Petitioner. The agreement provides that any grievance involving the interpretation of the agreement shall be submitted to arbitration for determination. Excerpts from this provision of the agreement is set forth in the Appendix, page 1.

On Friday, August 7, 1959, the employees of drayage and trucking firms doing business with Petitioner unexpectedly struck their employers. As a result, Petitioner was unable to obtain materials and supplies and

was required to curtail its production operations. It was therefore necessary to lay off at the end of the week, approximately sixty employees including Respondents, all represented by the Union. Notice of lay-off was given to the employees on Friday morning. Respondents were recalled to work the latter part of the following week.

Respondents claimed that they were entitled to pay for the time they were on lay-off because (1) the proper notice prior to a lay-off had not been given as required by Section 5(h) of the Agreement, and (2) such pay was required by Section 34(e) of the Agreement.

Sections 5(h) and 34(e) are set forth in the Appendix, page 2.

Section 5(h) required that the employer notify the Union by 11:00 o'clock a.m. Thursday of each week of employees to be laid off at the end of the work week. Such notice, however, was not required when it could not be given due to "equipment breakdown, acts of God, or other reasons beyond the control of the party." Petitioner contended that the unexpected strike came within the exception and that the notice was not required. The Respondents denied this contention. With respect to Section 34(e) Petitioner contended this section applied only to lay-offs and not to recalls from lay-offs.

The dispute solely involved the interpretation of the Agreement. This was the position of Respondents below. Petitioner contended that the disputed interpretation could be decided only in arbitration. Excerpts from the trial transcript and briefs in these respects appear in the Appendix, pages 3-5.

The Union filed an oral grievance on behalf of Respondents and others but did not process the grievance further. No demand for arbitration was made and no arbitration took place as to the disputed meaning of the provisions of the Agreement in question.

Thereafter, complaints for wages due were filed by Respondents with the Division of Labor Law Enforcement of the Department of Industrial Relations of the State of California. Petitioner contended before the Division that the issues involved were subject to arbitration under the Agreement. The Division dismissed the complaints upon this ground.

Respondents then filed claims with the Small Claims Division of the Municipal Court of the City of San Francisco. The Court rejected Petitioner's position that the issues were subject to arbitration and that the court was without jurisdiction to decide them. Instead it purported to interpret the provisions of the agreement and decide the issues on the merits. It granted judgment in favor of Respondents.

On appeal to the Superior Court of the State of California in and for the County of San Francisco, that court also rejected Petitioner's position that this was a matter for arbitration and that the court was without jurisdiction. It also purported to interpret the agreement and decided the issues on the merits. It granted judgment in favor of Respondents. A motion for a new trial was denied. This decision of the California Superior Court is the final decision of the California courts.

Argument.

Reasons for Granting the Petition.

Neither question presented in this case has been expressly decided by this Court. The answer to both is essential in view of the great volume of litigation in the federal and state courts involving individual employees, employers and labor organizations under collective bargaining agreements. Much confusion already exists in the cases deciding questions in this field.

I.

The first basic question presented here is whether in an action brought by an individual employee in a state court to enforce the provisions of a collective bargaining agreement covering employees in an industry affecting commerce, the state court, in view of the federal labor policy declared by this Court under Section 301, must apply federal substantive law.

We submit that if federal substantive law is not to be applied, the policy established by federal law concerning arbitration under collective bargaining agreements, would be frustrated. Major conflicts would develop in the law and the recently enunciated federal policy would be defeated. This policy has been declared in a series of decisions by this Court.

In *Textile Workers Union v. Lincoln Mills* (1957), 353 U. S. 448, 1 L. Ed. 2d 972, 77 S. Ct. 912, the Court held that Section 301 authorized the courts to fashion and apply substantive law based upon the policy of our national labor laws. That section, the Court said, "expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be

best obtained only in that way." Accordingly, the Court affirmed the action of the District Court under Section 301 compelling an employer to arbitrate a controversy concerning work loads and work assignments in accordance with the arbitration requirements of a collective bargaining agreement.

In 1960 this Court implemented the policy enunciated in *Lincoln Mills* and fashioned a significant body of federal law relating to the arbitration of disputes arising under collective bargaining agreements.

United Steelworkers v. America Mfg. Co. (1960) 363 U. S. 564, 4 L. Ed. 2d 1403, 80 S. Ct. 1343, holds in effect that under an arbitration provision requiring that disputes "as to the meaning, interpretation and application of the provisions of this agreement" be submitted to arbitration, a controversy is subject to arbitration even though the claim is patently frivolous and without merit. This Court said:

> "Section 203(d) of the Labor Management Relations Act, 1947, 61 Stat. 154, 29 USC § 173(d), states, 'Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. . . .' That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play.
>
> * * *
>
> "The function of the court is very limited when the parties have agreed to submit all questions of

contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. * * *"

United Steelworkers v. American Mfg. Co., 363 U. S. 564, 566-568.

In *United Steelworkers v. Warrior & Gulf Navigation Co.* (1960), 363 U. S. 574, 4 L. Ed. 2d 1409, 80 S. Ct. 1347, the Court said:

"But the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. * * *

"Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement. * * *

* * *

". . . [T]o be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. * * * Doubts should be resolved in favor of coverage."

United Steelworkers v. Warrior & G. Nav. Co., 363 U. S. 574, 580-583.

In *United Steelworkers v. Enterprise Wheel and Car Corp.* (1960), 363 U. S. 593, 4 L. Ed. 2d 1424, 80 S. Ct. 1358, the Court said:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the award. * * *
>
> * * *
>
> ". . . [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."
>
> *United Steelworkers v. Enterprise Corp.*, 363 U. S. 593, 596, 599.

Under these decisions the policy of the federal law is clear: Arbitration is a favored method of dispute settlement in the industrial relations field. Where a dispute exists as to the interpretation of the provisions of a collective bargaining agreement and the agreement provides for arbitration of such disputes, the dispute must be decided in arbitration and not by the courts. Doubts are to be resolved in favor of arbitration. The function of the courts is stated to be limited to the narrow one of determining whether an agreement to arbitrate the controversy exists.

The courts below did not apply this law but a different and conflicting law.

If under the identical collective bargaining agreement with an arbitration provision for the settlement of disputes, any individual employee could sue in the state courts for his own interpretation of the agreement, the federal policy would be frustrated and the scheme of industrial self-government seriously impaired. Under the same agreement one interpretation could result from arbitration in accordance with the agreement and with federal policy. In addition, any number of conflicting interpretations could also be made by the state courts. The interpretation would depend upon the forum chosen. This would create a situation clearly contrary to and in defeat of the policy enunciated by this Court.

The law applied by the state courts should be no more extensive concerning the same agreement than that applied by the federal courts. At least, a conflict between the two should not exist; state law should be compatible with federal policy in this field. Otherwise, the implementation of federal policy would be impossible to achieve.

Lincoln Mills expressly recognizes the necessity for the compatibility of state law with federal policy.

> "The question then is, what is the substantive law to be applied in suits under §301(a)? We conclude that the substantive law to apply in suits under §301(a) is federal law which the courts must fashion from the policy of our national labor laws. . . . Federal interpretation of the federal law will govern, not state law. [Cases Cited.] But state law, if compatible with the purpose of §301, may be resorted to in order to find the rule that will best effectuate the federal policy. [Cases Cited.] Any state law applied, however, will be

absorbed as federal law and will not be an independent source of private rights."

Textile Workers Union v. Lincoln Mills (1957), 353 U. S. 448, 456-457.

Lincoln Mills involved an action brought in a federal court. The law applied by state court's however, should not be in conflict with that fashioned pursuant to this declaration.

In *Local 24 of I.B. of T., C., W. & H. v. Oliver* (1959), 358 U. S. 283, 3 L. Ed. 2d 312, 79 S. Ct. 297, with respect to a different section of the Act, the Court said:

"Federal law here created the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties made in response to that duty, Textile Workers Union v. Lincoln Mills, 353 U. S. 448, 1 L. Ed. 2d 972, 77 S. Ct. 912; . . . Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State. [Cases cited.]"

Local 24 of I.B. of T., C., W. & H. v. Oliver, 358 U. S. 283, 296.

The courts below did not apply federal law but on the contrary acted in direct opposition to established federal policy. The arbitration process for which the parties had contracted was circumvented. The action of the courts below should be reviewed and set aside.

II.

A second basic question is raised in this case as to the effect of *Association v. Westinghouse Elec. Corp.* (1955), 348 U. S. 437, 99 L. Ed. 510, 75 S. Ct. 488. Respondents successfully urged in the courts below that the claims involved here are uniquely personal claims and that under *Westinghouse* actions thereon may be brought by the individual employee in the state courts even though interpretation of the agreement was required and arbitration machinery is provided in the agreement.

In *Westinghouse* the Court held that Section 301 did not permit a union to sue on behalf of employees for accrued wages based upon an alleged violation of a collective bargaining agreement: unions do not have any standing to file an action "based upon an employer's failure to comply with terms of a collective agreement relating to compensation, terms peculiar in the individual benefit which is their subject matter and which, when violated, give a cause of action to the individual employee." As stated by Justice Frankfurter, employees could enforce such uniquely personal rights in the state courts.

Subsequent to *Westinghouse*, a number of Circuit Courts of Appeal have held that uniquely personal claims are individual rights and suit must be brought by the individuals involved and not by the union under the collective bargaining agreement. This has been true even though the question of the interpretation or violation of the collective bargaining agreement may be involved.

See:

United Steelworkers v. Pullman-Standard Car Mfg. Co. (3rd Cir. 1957), 241 F.2d 547

(Unpaid pension payments based upon the interpretation of pension provisions of a collective bargaining agreement);

Local Lodge 2040, Internat'l Ass'n of Mach. v. Servel, Inc. (7th Cir. 1959), 268 F.2d 692 (Alleged breach of collective bargaining agreement by permanently dismissing employees and claim for holiday and vacation pay arising out of the agreement);

United Steelworkers of America v. New Park Mining Co. (10th Cir. 1959), 273 F.2d 352 (Recovery of wages and vacation pay due under a collective bargaining agreement);

Mississippi Valley Electric Co. v. Local 130, Etc. (5th Cir. 1960), 278 F.2d 764 (Action for wages allegedly due under an award made pursuant to an arbitration provision of a collective bargaining agreement);

Silverton v. Valley Transit Cement Company (9th Cir. 1957), 249 F.2d 409 (Action for wages allegedly due under a collective bargaining agreement).

A number of decisions of the Circuit Courts of Appeal have enforced agreements to arbitrate disputes in accordance with the arbitration provision of the collective bargaining agreement or have enforced arbitration awards issued pursuant thereto.

See:

Textile Workers Union of America v. Cone Mills Corp. (4th Cir. 1959), 268 F.2d 920;

A. L. Kornman Co. v. Amalgamated Clothing Workers (6th Cir. 1959), 264 F.2d 733;
Item Company v. New Orleans Newspaper Guild (5th Cir. 1958), 256 F.2d 855.

Westinghouse did not involve the scope of contract provisions concerning arbitration but only the status of the union to sue. On uniquely personal claims the employees were held to have an individual right to sue in the state courts. We submit, however, that if the validity of the "uniquely personal" claim is dependent upon the interpretation of the collective bargaining agreement providing for arbitration, such interpretation must be made not by the state courts but in arbitration as provided in the agreement. If not, diverse interpretations of the same agreement could again be the result and the forum chosen, not the merits, could be determinative.

The interest of a union and an employer is not any less in a disputed interpretation which may involve a uniquely personal claim than it is in other types of contract interpretation. Each is clearly interested in any binding interpretation of its agreement. The contracting parties bargained for a single interpretation in arbitration. If the law applied by the courts below were sustained, the contracting parties could be involved in a host of court actions purporting to interpret their agreement.

In the instant case, the federal policy clearly requires that the disputed interpretation of Sections 5(h) and 34(e) be decided by arbitration as provided in the collective bargaining agreement. The state courts, however, have invaded the province of the arbitrator, have

ignored the arbitration requirements of the agreement, and have purported to interpret the disputed provisions. If the state court in an action by individual employees under a collective bargaining agreement, applies law which ignores the arbitration process and is thereby in direct conflict with federal policy, the chaos and threat to industrial peace which the policy expressed in the *Lincoln Mills* and *Steelworkers* cases was designed to prevent, would be encouraged, and federal policy imperilled. The entire scheme for the private settlement of disputes in the labor relations field could be circumvented.

We believe that the questions raised by this Petition are substantial. We respectfully urge that it be granted.

Respectfully submitted,

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August 17, 1961.

APPENDIX.

Excerpts From the Applicable Collective Bargaining Agreement

Section 29, Adjustments of Disputes, provides in part as follows:

"*Section 29.* Adjustments of Disputes.

"(a) Any dispute or grievance arising at or involving an establishment subject to this Agreement shall be disposed of as follows:

* * *

"(4) Any grievance that involves the interpretation of this agreement . . . shall be submitted to arbitration through a signatory association and the Joint Board as follows:

* * *"

The entire section appears at pages 47 to 52 of the agreement [Clk. Tr. p. 67 ff].

Section 5(h) of the Agreement provides as follows:

* * *

"(h) This subsection shall apply only to an individual Employer when he has five (5) or more persons performing work covered by this Agreement. The Individual Employer will notify the employment office of the Local Union with jurisdiction by 11:00 o'clock a.m. Thursday of each week of the names of brewers, bottlers, checkers or shipping and receiving clerks to be laid off at the end of the work week, and the number of such employees to be hired at the start of the work week next following. The Local Union will notify the Individual Employer the following day not later than 2:00 o'clock p.m. of the number of such employees to be dispatched for employment on the following Monday to displace new or temporary employees, and the names of such employees the Local Union was able to contact and dispatch up to that time. The above provisions will not apply when the failure to give notice by the time specified was due to equipment breakdown, acts of God, or other reasons beyond the control of the party."

Section 34(e) provides:

* * *

"(e) There shall be no laying off for any fractional part of a day or week."

The Issue Decided by the Courts Below Was Solely One of Contract Interpretation

At the trial before the Superior Court the following occurred:

"The Court: In this Burgermeister matter, apparently it is an appeal from the Small Claims Court involving the interpretation of an agreement between the Union and the Employers, is that right?

"Mr. Kelly [Counsel for Defendant]: That is correct.

"Mr. Johnson [Counsel for the Plaintiffs]: That is correct." [Rep. Tr. p. 3.]

In his Opening Brief before the California Superior Court, counsel for Respondents states:

"I.

"The Facts

"These are actions by three (3) employees of Burgermeister Brewing Corporation, who were laid off in violation of a contract provision which prohibited layoffs of brewers for any fractional part of a day or week, to recover the balance of wages due them for the full work week commencing August 10, 1959.

* * *

"The contract provision in question appears in a separate division of the collective bargaining contract which sets forth the special wage rates and working conditions pertaining to brewers, and is designated Section 34 (e) thereof. * * *" [Clk. Tr. p. 27.]

* * *

"II.

"The Question for Decision

"On the basis of the foregoing, *the issue is one of contract interpretation*, namely, whether Section 5 (h) absolving the Company of the obligation to give notice of lay offs as of 11:00 o'clock A.M. of Thursday of the week preceding when the failure is due to 'reasons beyond the control of the party' is a limitation upon, and a qualification of the flat prohibition of lay-offs of brewers 'for any fractional part of a day or week' contained in Section 34 (e), such that the existence of such reasons would excuse the Company's violation of that prohibition." [Clk. Tr. p. 30, emphasis added.]

* * *

"Conclusion

"It is undisputed that the defendant Company laid off these three (3) plaintiffs in violation of the flat prohibition of Section 34 (e) of the collective bargaining contract against laying off for any fractional part of a day or week. The Company's attempt to excuse its violation of Section 34 (e) by reference to Section 5 (h) must fail because under elementary rules of contract interpretation the latter section cannot be construed as a limitation upon, or qualification of, the former. The plainiffs are therefore entitled to judgments for the balance of their week's wages in the amounts for which they had judgment in the Municipal Court." [Clk. Tr. pp. 36-37.]

PETITIONER CONTENDED AT THE TRIAL AND IN ITS BRIEFS THAT RESPONDENTS HAD NO STANDING TO SUE BECAUSE THE DISPUTE WAS SUBJECT TO ARBITRATION

At the trial:

"Mr. Kelly: * * * Our intention in submitting it in evidence is to show that the Union as a representative of the employees, and the employees, have refused to arbitrate this matter as provided for in the agreement, and as such we feel they have no standing in Court at all until they have exhausted their administrative remedies under the contract that they are parties to." [Rep. Tr. p. 16.] (See also p. 30.)

See also Petitioner's briefs and particularly pages 44 *et seq.*, page 79 *et seq.*, and page 86 *et seq.* of the Clerk's Transcript.

SEP 20 1961
JAMES R. BROWNING, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1961

No. 340

BURGERMEISTER BREWING CORPORATION,
Petitioner,

vs.

RICHARD C. LINDSTROM, ARCHIE ALDINI and JOHN P. FOLEY,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Subject Index

Page

Statement of the case 2

Argument 4

I

Petitioner having failed to present any federal question in the state courts or to exhaust its remedies under state law is not entitled to have certiorari issued.... 4

II

The petition in any event presents no substantial question for decision and should be denied..... 7

Conclusion 20

Table of Authorities Cited

Cases

Page

Association v. Westinghouse Electric Corporation, 348 U.S. 437, 99 L. ed. 510, 75 S. Ct. 488..... 9

Cone v. Union Oil Company, 129 Cal. App. 2d 558..... 16

Congress of Industrial Organizations v. McAdory, 325 U.S. 472, 89 L. ed. 1741..... 4

Copper Weld Steel Co. v. Ind. Acc. Com., 324 U.S. 780, 89 L. ed. 1363, 65 S. Ct. 1006..... 7

Int. Assn. of Machinists v. Cutter-Hammer, Inc., 271 App. Div. 917, 67 N.Y.S. 2d 317..... 17

Landreth v. South Coast Rock Co., 136 Cal. App. 457.... 5

Levy v. Superior Court, 15 Cal. 2d 692..... 15

Pages

McCarroll v. L. A. County, 49 Cal. 2d 45 18

Palmer v. Fix, 104 Cal. App. 562 7
Posner v. Grunwold-Marx, Inc., 56 A.C. 159 17

Richman v. California, 363 U.S. 821, 4 L. ed. 2d 1517, 80 S. Ct. 1256 2
Rohr Aircraft Corp. v. County of San Diego, 362 U.S. 628, 80 S. Ct. 1050, 4 L. ed. 2d 1050 5

Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 4 L. ed. 2d 1409, 80 S. Ct. 1347 .....11, 12, 15, 17, 18

Textile Workers v. Lincoln Mills, 353 U.S. 448, 1 L. ed. 2d 972, 77 S. Ct. 912 7

United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656, 98 L. ed. 1025, 74 S. Ct. 833 13
United Steelworkers v. American Mfg. Co., 363 U.S. 564, 4 L. ed. 2d 1403, 80 S. Ct. 1343 17
United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 18

Statutes

California Code of Civil Procedure:
Section 117 2
Section 117j 2
Section 1280 15
Section 1284 5

California Labor Code.
Sections 200-226 19
Sections 215 and 216 19
Section 218 19

Labor-Management Relations Act, 1947:
Section 9(a) (29 U.S.C. Sec. 159(a)) 14
Section 301(a) (29 U.S.C. Sec. 185) 4, 7, 9, 12, 14

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1961

No. 340

BURGERMEISTER BREWING CORPORATION,
Petitioner,

vs.

RICHARD C. LINDSTROM, ARCHIE ALDINI and JOHN P. FOLEY,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petition on file herein seeks review of three actions brought by respondents in the Small Claims Court of the City and County of San Francisco, State of California, to recover wages from their employer Burgermeister Brewing Corporation, the Petitioner herein. The jurisdiction of the Small Claims Court is

limited by law to claims not exceeding $150.00 (Calif. Code of Civil Procedure, Sec. 117); the proceedings are of an informal nature and the parties are not permitted representation by counsel (Sec. 117j).

Respondent Aldini recovered judgment in the Small Claims Court for wages in the amount of $23.30 and $1.00 costs; respondent Foley, for $93.20 and $1.00 costs; and respondent Lindstrom, for $46.60 and $1.00 costs (Cl. Tr. pp. 9A, 12A, 14A). Petitioner, defendant below, appealed to the Superior Court of the City and County of San Francisco, which after trial de novo as provided in California Code of Civil Procedure, Section 117j, affirmed the judgments (Cl. Tr. pp. 75, 76 and 77). Petitioner's motion for a new trial was thereafter denied (Cl. Tr. p. 94).

The nature and size of the claims involved invite application of the maxim de minimis (see: *Richman v. California*, 363 U.S. 821, 4 L. ed. 2d 1517, 80 S. Ct. 1256).

STATEMENT OF THE CASE

Respondents have no particular quarrel with Petitioner's Statement of the Case, which appears to be factually correct, except in one vital respect.

Petitioner gives the impression that the collective bargaining agreement between it and the Teamster Brewery and Soft Drink Workers Joint Board of California provided a remedy by way of arbitration which was available to respondent employees and that they failed to avail themselves of this remedy.

Such is not the case at all.

The provisions with respect to arbitration appear in Section 29 of the collective bargaining agreement, which section is set forth in full in the Appendix hereto. This Section, entitled "Adjustment of Disputes", permits only the Local Union, or the Individual Employer, in the local area, in a dispute involving discharge or other disciplinary action (Subsection (a)(3)) or the Teamster Brewery and Soft Drink Workers Joint Board of California and a signatory Association, in disputes involving interpretation of the agreement (Subsection (a)(4)), to invoke the procedures of arbitration.

Subsection (a)(4) of the Agreement, which is the particular provision relied upon by Petitioner, provides that "any grievance which involves interpretation of this agreement . . . shall be submitted to arbitration through a signatory Association and the Joint Board . . .".

Nowhere in Section 29, or in any other part of the Agreement, is it provided that an aggrieved employee may invoke the procedures of arbitration or require the Joint Board to invoke them upon his behalf.

Neither the Joint Board nor the Employer Association representing the employer having demanded arbitration under Subsection (a)(4), respondents perforce had to, and did, commence their actions in the Small Claims Court of the City and County of San Francisco, State of California, or be left without any remedy at all.

Viewed in the light of the foregoing, the questions which Petitioner states are presented for review are not in fact presented at all, since they turn upon the false assumptions that "the agreement provides for arbitration of such dispute" and "such agreement specifically provides machinery for arbitration of such disputes."

ARGUMENT

I

PETITIONER HAVING FAILED TO PRESENT ANY FEDERAL QUESTION IN THE STATE COURTS OR TO EXHAUST ITS REMEDIES UNDER STATE LAW IS NOT ENTITLED TO HAVE CERTIORARI ISSUED.

Although Petitioner in its brief before the Superior Court of the State of California makes passing reference to decisions of this Court having to do with the effect of federal substantive law under Section 301 (a) of the Labor-Management Relations Act, 1947, the question of federal pre-emption which is urged at length in the Petition was never presented to the state courts.

In *Congress of Industrial Organizations v. McAdory*, 325 U.S. 472, 89 L. ed. 1741, this Court held that it had no jurisdiction to determine whether a state labor statute making it unlawful for executive or supervisory personnel to be members of a labor organization was in conflict within the National Labor Relations Act and therefore void, because the question of pre-emption of the federal Act was never presented to the State Courts and was not passed upon by them. (See

also: *Rohr Aircraft Corp. v. County of San Diego*, 362 U.S. 628, 80 S. Ct. 1050, 4 L. ed. 2d 1050, and cases therein cited.)

But in addition, Petitioner failed at any stage of the proceedings in the state courts to move for a stay as it was entitled to do under California State Law, if in fact as Petitioner now contends, the matter was referable to arbitration.

Section 1284 of the California Code of Civil Procedure provides:

> "1284. Stay of civil action. If any suit or proceeding be brought upon any issue arising out of an agreement providing for the arbitration thereof, the court in which such suit or proceeding is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration, shall stay the action until arbitration has been had in accordance with the terms of the agreement; provided, that the applicant for the stay is not in default in proceeding with such arbitration."

The California courts have held that the failure to make application for a stay under the above section of the Code of Civil Procedure amounts to a waiver of the right to demand arbitration. Thus, in *Landreth v. South Coast Rock Co.*, 136 Cal. App. 457, the Court said:

> "It is well settled that ordinarily a right given by statute or created by contract may be waived by the party in whose favor it exists. Dicta in the case of Palmer v. Fix, 104 Cal. App. 562, 571 (286 Pac. 498), would indicate that where a suit

> was pending, involving a contract containing an arbitration agreement, and the defendant made no request or application to the court to stay the action pending such arbitration, he waived his right to demand such a proceeding and submitted to the jurisdiction of the court to render judgment upon the merits. While this is dicta it would seem to be well founded in reason. (2) The act in question does not by its terms seen to intend to deprive the superior court of jurisdiction of cases involving contracts with arbitration agreements, but merely to provide a summary means by which the arbitration agreement can be enforced should one of the parties desire to rely upon it. It would seem to be the right of the party to invoke this summary power of the court which would be waived if he did not avail himself of it."

Petitioner made no application to stay the actions by respondents either in the Small Claims Court or in the Superior Court. Instead, it proceeded to trial in the Small Claims Court and later to a trial de novo upon its appeal to the Superior Court, without objection, until at the very end of the trial de novo before the Superior Court it orally moved for judgment because of the alleged failure of respondents, plaintiffs below, to put the matter to arbitration (Tr. p. 30). The motion was denied (Rep. Tr. p. 31). Even granting that a motion for judgment orally made at the close of the testimony would meet the requirement of an application for a stay of the proceedings under the code section above cited, it was properly denied under California law because made

for the first time on appeal (*Palmer v. Fix,* 104 C.A. 562).

Having thus waived its right to insist upon arbitration by failing to make proper application for a stay in the State court, Petitioner is without right to petition for certiorari (*Copper Weld Steel Co. v. Ind. Acc. Com.,* 324 U.S. 780, 89 L. ed. 1363, 65 S. Ct. 1006).

II

THE PETITION IN ANY EVENT PRESENTS NO SUBSTANTIAL QUESTION FOR DECISION AND SHOULD BE DENIED.

Aside from these procedural questions, as respondent employees see it, the real question presented on the record is whether the policy of federal substantive law under Section 301 (a) of the Labor-Management Relations Act, 1947, in favor of arbitration of labor disputes, goes so far as to oust the State Courts of jurisdiction of an employee's uniquely personal claim for wages against his employer when he is without the right or power to submit to arbitration and the Union and employer principals to the collective bargaining agreement fail or refuse to submit it.

The power of the Federal Courts to enforce the national policy in favor of arbitration of labor disputes, as declared by the Court in *Textile Workers v. Lincoln Mills,* 353 U.S. 448, 1 L. ed. 2d 972, 77 S. Ct. 912, is based squarely upon Section 301 (a) of the Act (29 U.S.C. Sec. 185). This Court said:

"From the face of the Act it is apparent that Section 301 (a) and 301 (b) supplement one another. Section 301 (b) makes it possible for a labor organization, representing employees in an industry affecting commerce, to sue and be sued as an entity in the federal courts. Section 301 (b) in other words provides the procedural remedy lacking at common law. Section 301 (a) certainly does something more than that. Plainly it supplies the basis upon which the federal district courts may take jurisdiction and apply the procedural rule of Section 301 (b) . . .".

* * * * * * *

"The question then is, what is the substantive law to be applied in suits under 301 (a)? We conclude that the substantive law to apply in suits under 301 (a) is federal law which the courts must fashion from the policy of our national labor laws. The Labor-Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. Federal interpretation of the federal law will govern, not State law. But State law, if compatible with the purpose of 301 (a), may be resorted to in order to find the rule that will best effectuate the federal policy. Any State law applied, however, will be absorbed as Federal law and will not be an independent source of private right."

Since Section 301 (a) is thus made the source, it must also be the measure, of the power to fashion the federal law which is to govern.

Decisions of this Court already give clear indication that the limitations upon the power to fashion will come from at least two different directions.

In the first place, Mr. Justice Frankfurter in *Association v. Westinghouse Electric Corporation*, 348 U.S. 437, 99 L. ed. 510, 75 S. Ct. 488, said:

> "Considering the nature of a collective bargaining contract, which involves the correlative rights of employer, employee and union, we might be disposed to read § 301 as allowing the union to sue in this case. With due regard to the constitutional difficulties which would be raised, and in view of the fact that such an interpretation would bring to the federal courts an extensive range of litigation heretofore entertained by the States, we conclude that Congress did not will this result. There was no suggestion that Congress, at a time when its attention was directed to congestion in the federal courts, particularly in the heavy industrial areas, intended to open the doors of the federal courts to a potential flood of grievances based upon an employer's failure to comply with terms of a collective agreement relating to compensation, terms peculiar in the individual benefit, which is their subject matter and which, when violated, give a cause of action to the individual employee. The employees have always been able to enforce their individual rights in the state courts. They have not been hampered by the rules governing unincorporated associations. To this extent, the collective bargaining contract has always been 'enforceable.'

Nowhere in the legislative history did Congress discuss or show any recognition of the type of suit involved here, in which the union is suing on behalf of employees for accrued wages. Therefore, we conclude that Congress did not confer on the federal courts jurisdiction over a suit such as this one."

Mr. Chief Justice Warren and Mr. Justice Clark in a concurring opinion said:

"We agree with the decision but not with all that is said in the opinion. The only question we see here is one of statutory interpretation. For us the language of § 301 is not sufficiently explicit nor its legislative history sufficiently clear to indicate that Congress intended to authorize a union to enforce in a federal court the uniquely personal right of an employee for whom it had bargained to receive compensation for services rendered his employer. Thus viewed, it becomes unnecessary for us either to make labor policy or to raise constitutional issues."

And Mr. Justice Reed also concurring, said:

"The reason, I think, that this union cannot recover from the employer in this suit under § 301 is that the claim for wages for the employees arises from separate hiring contracts between the employer and each employee. The union does not undertake to do work for the employer or even to furnish workers. The duty, if any there be, to pay wages to an employee arises from the individual contract between the employer and employee, not from the collective bargaining agreement. Therefore there is set out no violation of a contract between an employer and a labor or-

> ganization as is required to confer jurisdiction under § 301. The facts show an alleged violation of a contract between an employer and an employee—a situation that is not covered by the statute."

In passing, we note the similarity between the rights asserted by the labor organization upon behalf of the individual employees, which this Court held to be "uniquely personal", in the above case and those asserted by respondent employees in the proceedings below. Both involved claims for wages due employees under collective bargaining contract for periods of time when they were on lay-off or otherwise not working. Petitioners in fact appear to concede the uniquely personal nature of the claims of respondents.

Secondly, in *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, 4 L. ed. 2d 1409, 80 S. Ct. 1347, this Court said:

> "The Congress, however, has by §301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Yet, to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under §301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or agreed to give the arbitrator power to make the award he made. An order to arbitrate the particular griev-

> ance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

The area of impact of the newly established federal substantive law is therefore measured both by the nature of the right asserted, i.e., whether it is a "uniquely personal right" of the employees, or a right asserted by a labor organization upon behalf of the employees represented by it as a class, and by the extent of the contract provision for arbitration.

The question whether a uniquely personal claim of an employee would fall within the area of impact of the federal substantive law under Section 301 (a), if it were expressly made the subject of arbiration under the collective bargaining contract is not here presented, because as we have shown, the employee was not given the right under the collective bargaining agreement to invoke the procedures of arbitration.

The precise question here presented is whether the thrust of the national policy is such as to oust the state courts of jurisdiction and to leave the employees without a remedy, when the collective bargaining representatives, both employer and employee, fail to invoke the procedures of arbitration upon their behalf.

The suggestion implicit in *Warrior & Gulf Navigation Co.* is that, if the claim is found not to be subject to arbitration, the state courts shall have jurisdic-

tion to grant the traditional remedies for breach of contract.

In *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 98 L. ed. 1025, 74 S. Ct. 833, this Court in considering the pre-emptive impact of other sections of the 1947 Act dealing with regulation of unfair labor practices, said:

> "Petitioners contend that the Act of 1947 has occupied the labor relations field so completely that no regulatory agency other than the National Labor Relations Board and no court may assert jurisdiction over unfair labor practices as defined by it, unless expressly authorized by Congress to do so. They claim that state courts accordingly are excluded not only from enjoining future unfair labor practices and thus colliding with the Board, as occurred in Garner v. Teamsters Union, 346 U. S. 485, 33 LRRM 2218, but that state courts are excluded also from entertaining common-law tort actions for the recovery of damages caused by such conduct. The latter exclusion is the issue here. In the Garner case, Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collective damages for injuries caused by tortious conduct. For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct. We see no substantial reason for reaching such a result. The

> contrary view is consistent with the language of the Act and there is positive support for it in our decisions and in the legislative history of the Act."

Certainly the United States Congress has neither provided nor suggested in Section 301 (a) any substitute for the traditional state court procedures for employees to collect their wages, or to vindicate any other of their uniquely personal rights. It is not to be anticipated that the "range of judicial inventiveness", to which the development of a large part of the new body of federal law is admittedly left, will be so exercised, within the limits already fixed by this Court, as to deprive the employees of these traditional remedies, and to leave them, at least in the situation here presented, without any remedy at all.

The policy of the federal substantive law is in favor of arbitration of labor disputes when the collective bargaining contract provides for such arbitration. There is nothing inconsistent with this policy, in leaving employees free to pursue their traditional state court remedies when the collective bargaining contract does not so provide.

The 1947 Act itself recognizes the right of employees to present their own grievances individually. The proviso to Section 9 (a) (29 U.S.C. Sect. 159 (a)) is as follows:

> " . . . Provided, that any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted without the in-

> tervention of the bargaining representative, so long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect. Provided further, that the bargaining representative has been given an opportunity to be present at such adjustment."

The policy of the California law, which the state courts applied in the proceedings below, is entirely consistent with the policy of the federal substantive law announced in *Warrior & Gulf Navigation Co.*, supra.

Agreements to arbitrate, generally speaking, are declared to be valid and enforceable by Section 1280 of the California Code of Civil Procedure.

In *Levy v. Superior Court*, 15 Cal. 2d 692, the Supreme Court of the State of California held that arbitration provisions in collective bargaining contracts are valid and enforceable under the aforesaid section of the Code of Civil Procedure. The Supreme Court of the state said:

> "It is further brought to our attention that arbitration under collective bargaining agreements has been one of the most potent factors in establishing and maintaining peace and protection in industry; and that organized labor is more and more resorting to the courts for recognition of the lawfulness and enforceability of collective bargaining agreements, rather than electing to settle its disputes by other methods. . . ".

In line with the above, it has since become the firmly established law of the State of California that

where arbitration is provided in a collective bargaining contract, the parties must exhaust that remedy before resort to the courts. Thus in *Cone v. Union Oil Company*, 129 Cal. App. 2d 558, it is said:

> "It is the general rule that a party to a collective bargaining contract which provides grievance and arbitration machinery for the settlement of disputes within the scope of such contract must exhaust these internal remedies before resorting to the courts in the absence of facts which would excuse him from pursuing such remedies. (*Barker v. Southern Pac. Co.*, (9th Cir.) 214 F.2d 918; *Wallace v. Southern Pac. Co.*, 106 F. Supp. 742 (N. D. Calif.); *Huberl v. Southern Pac. Co.*, 94 F. Supp. 11 (N. D. Calif.); *Hingle v. Transcontinental & Western Air, Inc.*, 113 F. Supp. 897, 899; *Transcontinental & Western Air, Inc. v. Koppal*, 345 U.S. 653 (73 S.Ct. 906); *Reed v. St. Louis S.W.R. Co.*, (Mo. App.) 95 S.W. 2d 887.) This rule, which is analogous to the rule requiring the exhaustion of administrative remedies as a condition precedent to resorting to the courts (2 Cal. Jur. 2d 304, §184), is based on a practical approach to the myriad problems, complaints and grievances that arise under a collective bargaining agreement. It makes possible the settlement of such mattters by a simple expeditious and inexpensive procedure, and by persons who, generally, are intimately familiar therewith. (*Utah Const. Co. v. Western Pac. R. Co.*, 174 Cal. 156 (162 P. 631).) . . . Such procedures, which have been worked out and adopted by the parties themselves, must be pursued to their conclusion before judicial action may be instituted unless circumstances exist which would excuse the failure to

follow through with the contract remedies. (*Barker v. Southern Pac. Co.*, supra; *Wallace v. Southern Pac. Co.*, supra; *Huberl v. Southern Pac. Co.*, supra; *Transcontinental & Western Air, Inc. v. Koppal*, supra.)".

In a very recent decision, *Posner v. Grunwold-Marx, Inc.*, 56 A.C. 159, the California Supreme Court rejected the so-called Cutter-Hammer doctrine (*Int. Assn. of Machinists v. Cutter-Hammer, Inc.*, 271 App. Div. 917, 67 N.Y.S. 2d 317) which was denounced by this Court in *United Steel Workers v. American Mfg. Co.*, 363 U.S. 564, 4 L. ed. 2d 1403, 80 S. Ct. 1343, and expressly accepted the statement of policy expressed by this Court in *Warrior & Gulf Navigation Co.* The California Supreme Court said:

"Our own state policy favors arbitration provisions in collective bargaining agreements and recognizes the important part that they play, in helping to promote industrial stabilization. Section 1280 of the Code of Civil Progedure provides that 'A provision in a written contract to settle by arbitration a controversy thereafter arising out of the contract or the refusal to perform the whole or any part thereof . . . shall be valid, enforceable and irrevocable . . .' And Section 1282 of the Code of Civil Procedure provides in part that 'A party aggrieved by the failure, neglect or refusal of another to perform under an agreement in writing providing for arbitration may petition . . . for an order directing that such arbitration proceed in the manner provided for in such agreement.' In holding those provisions applicable to collective bargaining agreements, the

> court in Levy vs. Superior Court, 15 Cal. 2d 692, noted at page 704, that arbitration under collective bargaining agreements has been one of the most potent factors in establishing and maintaining peace and protection in industry . . .' Chavez vs. Sargent, 52 Cal. 2d 162, at page 197, declared that 'State laws as they should be interpreted and applied, at least since the 1947 and subsequent enactments, continue to permit, to encourage and protect collective bargaining agreements which have been freely negotiated and entered into by and between employees lawfully authorized organizations and their employers whereby the interests of each party may be advanced.' Thus, our state policy does not substantially differ from 'the present federal policy which is to promote industrial stabilization through the collective bargaining agreement'" (*United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578).

But consistently with the federal policy expressed in *Warrior & Gulf Navigation Company*, supra, by this Court, the Supreme Court of the State of California has also held that when the parties have not agreed to arbitration, they shall have the right to resort to the courts. Thus, in *McCarroll v. L. A. County*, 49 Cal. 2d 45, the California Supreme Court said:

> "It is urged that arbitration provisions in collective bargaining agreements should when possible be construed broadly to cover all disputes between the parties to the end that the contract will provide a complete system of government for the parties, a system far more satisfactory than any of the courts can provide, and because estab-

> lished by the parties themselves, more likely to lead to industrial peace. We do not dispute the attractiveness of the ideal, but it does not justify overriding the parties' intentions and forcing on them a method of decision wholly unexpected in its application. As Mr. Justice Cardozo pointed out in Marchant vs. Mead-Morrison Mfg. Co., 252 N. Y. 284 (169 N.E. 386, 391, 393) Courts are not at liberty to shirk the process of construction under the empire of a belief that arbitration is beneficent, any more than they may shirk it if their belief happens to be to the contrary. No one is under a duty to resort to these conventional tribunals, however helpful their processes, except to the extent that he has signified his willingness . . . (The contracting parties) . . . are not to be trapped by a strained and involved construction of words of doubtful import into an abandonment of legal remedies, unwilled and unforeseen."

The right of an employee to receive prompt and full payment of his wages is fully implemented by the California Labor Code, Sections 200-226, inclusive; the employee's right to sue for his wages, as might be expected, receives express recognition in Section 218 of the Labor Code. The failure of the employer to pay wages is punishable as a misdemeanor under Sections 215 and 216 of the same Code.

Petitioner's theory of pre-emption would deprive respondents of these fundamental rights and leave them entirely without a remedy.

We are confident that this is not the policy of the federal substantive law.

CONCLUSION

It is respectfully urged that Petitioner has not presented any question for review by this Court and that the petition should be denied.

Dated, September 18, 1961.

Respectfully submitted,

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Attorney for Respondents.

HERBERT S. JOHNSON,
McCARTHY, O'HARA & JOHNSON,
Of Counsel.

(Appendix Follows.)

EXCERPTS FROM THE APPLICABLE COLLECTIVE BARGAINING AGREEMENT

SECTION 29. ADJUSTMENTS OF DISPUTES.

(a) Any dispute or grievance arising at or involving an establishment subject to this Agreement shall be disposed of as follows:

(1) Such dispute or grievance shall be presented orally or in writing at the shop level between the steward and the Individual Employer's representative. If action on the dispute within two (2) days is unsatisfactory, the grievance may be stated in writing and delivered to the Individual Employer or the Local Union involved within four (4) days of its occurrence. If a dispute does not arise at job level, it may be stated in writing and delivered promptly to the Individual Employer or to the Local Union or Union by the Individual Employer or any signator.

(2) The issue presented in such written statement shall be considered by representatives of the parties involved for adjustment in accordance with the terms of this agreement. Should such representatives fail to agree on settlement within five (5) days after submission to them, either party may ask that the dispute be submitted to arbitration.

(3) If the principal issue in dispute is one as to facts regarding discharge or other disciplinary action, and the basic issue is not one of the interpretation of the contract that may create a precedent, the matter may be submitted to arbitration in the local area by the Individual Employer or his representative and

Local Union involved under the terms of a written agreement to arbitrate, stating the nature of the dispute. Such agreement to arbitrate shall be submitted by the parties to the Teamster Brewery & Soft Drink Workers Joint Board of California, to the California Brewers Association and the California Beer Wholesalers Association, Inc at least five (5) days before the hearing before the arbitrator. The parties shall advise the Joint Board and such associations of the appointment of the arbitrator and of the time for hearing. The parties shall then proceed to arbitrate the matter in controversy subject to the right of either the California Brewers Association or the California Beer Wholesalers Association, Inc. or the Joint Board to appear and move that the matter be transferred for hearing under sub-paragraph (4) hereof. The parties shall be limited strictly to the determination of the facts and the application of clear provisions of the agreement as written, to such facts. The decision of the arbitrator within his powers on a dispute properly before him shall be final and binding on the parties to the proceeding, but it shall not constitute a precedent under this agreement. Said decision shall be made within ten (10) days of the appointment of the arbitrator. All expenses and charges of the arbitrator and the cost of the hearing room and reporter, if any, shall be shared by the Local Union and the Individual Employer involved. Any question as to whether there has been an improper action in applying the agreement or by proscribed interpretation of the agreement may be considered under sub-paragraph (4) hereof.

(4) Any grievance that involves the interpretation of this agreement or does not relate solely to discharge or other disciplinary matters or raises a question of jurisdiction of an arbitrator, shall be submitted to arbitration through a signatory association and the Joint Board as follows:

Representatives of the California Brewers Association or the California Beer Wholesalers Association, Inc. as the case may be and the Joint Board may meet in an attempt to dispose of the grievance without formal arbitration proceedings, and after filing under (1) or handling under (2) or (3). At any time either the Joint Board or a signatory association may ask for the appointment of an impartial arbitrator and such parties shall then select an impartial and competent third person as arbitrator. The matter shall promptly be submitted to arbitration. The arbitrator's jurisdiction shall extend to all issues arising between such parties. His powers shall be limited strictly to the application and interpretation of this agreement as written; he shall have no power to add to or subtract from the agreement, whether by imposing any obligation or restraint, granting any right or privilege or power, or otherwise. The arbitrator's decision within the stated powers on a dispute properly before him shall be final and binding on all persons. All expenses and charges of the arbitrator and the cost of the hearing room and reporting shall be borne equally by the parties. A signatory association shall have the right in such arbitration to be heard to the extent of its interest.

(b) Pending settlement of any dispute between the parties in accordance with this section, there shall be no stoppage of work either on the part of the Individual Employer, the employees, any Local Union, or the Union; providing that said work shall continue in the manner in which it had previous to the arising of the dispute and prompt submission of it to the procedures of this paragraph, and that such work shall be performed, or such payments made, as had been done or paid previous to the arising of the dispute and the prompt submission of it for decision under this paragraph. It is the considered and deliberate intention of the Union, the Local Unions, the Individual Employers and the other signators to avoid, insofar as possible, the stoppage of work.

(c) Any strike or lockout prior to the rendering of a decision under paragraph (a) hereof, except as is privileged under other paragraphs of this Agreement, or any strike or lockout in protest of any decision under paragraph (a) shall be a violation of this Agreement. The arbitrator is empowered to impose appropriate penalty upon the party guilty of such violation.

(d) Should the parties be unable to agree upon a person to act as arbitrator within seven (7) days after arbitration has been demanded in accordance with the terms of this section, either party may request the Chief Judge of the United States District Court for the Northern District of California to appoint an arbitrator to dispose of the issue. All arbitrators' decisions shall be in writing and acknowledged in California before a notary public.

FILED
SEP 28 19[illegible]
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961
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Petitioner,

vs.

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Respondents.

Answer to Brief of Respondents in Opposition to Petition for Writ of Certiorari.

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Answer to Brief of Respondents in Opposition to Petition for Writ of Certiorari.

I.

Respondents' Contentions That Petitioner Failed to Present Any Federal Question in the State Courts or to Exhaust Its Remedies Under State Law Are Wholly Without Merit.

Respondents argue that Petitioner only made "passing reference" to the requirements of the federal substantive law in the courts below. On the contrary, the fact that the disputed issue of contract interpretation must be resolved by arbitration and not by the courts, as required by federal law and as enunciated by this Court, was raised and argued in all of the proceedings below. This included a Motion for Judgment at the trial upon the ground that the dispute must be resolved by arbitration and not by the courts. The mo-

tion was denied [Rep. Tr. pp. 31-32; see also Rep. Tr. p. 16]. The matter was extensively argued including reliance upon the *Lincoln Mills* and *Steelworkers* decisions of this Court [Clk. Tr. pp. 80 *et seq.*, 44 *et seq.*, 55-56, and 79 *et seq.*]. Indeed, the Division of Labor Law Enforcement of the State of California dismissed the complaint filed with that agency upon this ground as urged by Petitioner even prior to the court action having been filed by Respondents.

Respondents also contend that by not seeking a stay of the state court action Petitioner "waived its right to insist upon arbitration" (p. 7). This assumes that Petitioner had an obligation or desire to demand arbitration. It had neither. There was no duty upon Petitioner to initiate any proceeding to require it to pay money it felt it did not owe.

Respondents filed the state court action. Petitioner in response thereto contended that *if the disputed issue of contract interpretation were to be determined* it must be determined under the contractually agreed arbitration procedure and not by the courts. Whether or not it was to be determined was not a choice to be made by Petitioner. There was no reason for or obligation upon it to demand arbitration. If arbitration was desired Petitioner of course would arbitrate in accordance with contract procedures. If arbitration was not desired Petitioner was content not to pay the disputed amount.

Petitioner therefore had no occasion to make application for a stay under Section 1284 of the California Code of Civil Procedure. That section is wholly inapplicable here. There was nothing for Petitioner to waive.

II.

Respondents Contend That an Individual Employee May Resolve a Grievance Under a Collective Bargaining Agreement by Resort to the State Courts Even Though His Union Determines Not to Process Such Grievance Through the Contractual Grievance and Arbitration Procedure. This Is in Direct Conflict With Federal Substantive Law.

Respondents' Brief in Opposition to the Petition for Writ of Certiorari emphasizes the importance of the questions presented by the Petition and the necessity that they be resolved by this Court.

In support of the decisions of the courts below, Respondents state the California law to be that where a disputed interpretation of a collective bargaining agreement exists between an employer and a union which may affect the compensation of an individual employee, and the union and the employer determine not to submit the dispute to arbitration under the applicable arbitration provision, the employee may independently resolve the dispute by an action in the state courts.

In other words, the individual employee may overrule the decision of the union representing him; if the union in the administration of the agreement and in applying the "common law of the plant" determines not to process an employee's grievance through the arbitration procedure, the employee may then seek to enforce his grievance by an action in the state courts. This can be done, Respondents say, despite the fact that the parties had bargained for the interpretation of the agreement in disputed cases through the arbitration process and not by the courts.

Respondents throughout their brief ignore the undisputed fact that *the validity of their claims depends upon a disputed interpretation of the provisions of the collective bargaining agreement,* which disputed interpretation can *only* be resolved by arbitration.

We submit that the result for which Respondents contend would be disastrous to the peaceful and orderly settlement of industrial disputes. It would be directly contrary to the federal substantive law and the policy expressed by this Court in the *Steelworkers* cases.

For the foregoing reasons and for those stated in the Petition, we respectfully urge that the Petition be granted.

Respectfully submitted,

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September 26, 1961.

SUBJECT INDEX

PAGE

I.

Respondents contentions that petitioner failed to present any federal question in the state courts or to exhaust its remedies under state law are wholly without merit 1

II.

Respondents contend that an individual employee may resolve a grievance under a collective bargaining agreement by resort to the state courts even though his union determines not to process such grievance through the contractual grievance and arbitration procedure. This is in direct conflict with federal substantive law 3

AUTHORITY CITED

California Code of Civil Procedure, Sec. 1284 2